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II INTERNATIONAL CRIMINAL COURT

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The International Criminal Court (ICC) experienced a historical moment this year. On 14 March 2012, nearly a decade after the Rome Statute entered into force, the Court delivered its first verdict. Trial Chamber (TC) I found Thomas Lubanga Dyilo guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the Democratic Republic of the Congo (DRC) from 1 September 2002 to 13 August 2003.¹

With this long-awaited Judgment, which runs to almost 600 pages, the Court also concluded its very first trial. Lubanga, the Court's first suspect, was transferred to The Hague in March 2006. He was already facing murder and torture charges in the DRC at the time, for which he had been in detention in the DRC since March 2005. But the ICC Prosecutor made the much-disputed decision to only prosecute Lubanga for the use of child soldiers, a war crime that gained in global popular attention earlier this year with the Kony2012 viral video. Before closing submissions were held in August 2011, stays of proceedings and fair trial issues had plagued the trial. In the summer of 2008, the Trial Chamber even ordered Lubanga's release, because the Prosecutor had withheld potentially exculpatory evidence from the defence. The Appeals Chamber later reversed this order, and Lubanga remained in detention.

Regardless of these controversies, the Lubanga verdict is a milestone for the ICC and its Chief Prosecutor, not in the least because of the important issues surrounding the co-perpetration mode of liability it deals with. In its Judgment, the TC essentially followed the Pre-Trial Chamber's (PTC) Confirmation of Charges decision with respect to how co-perpetration in Article 25(3)(a) of the Rome Statute is to be interpreted: liability for committing a crime "jointly with another" attaches only to individuals who can be said to have control over the crime. With respect to the objective requirements of this mode of liability, the Majority first noted that proving the commission of such a crime includes showing the existence of an agreement or common plan between two or more persons. The plan need not be "intrinsically criminal," but as a minimum, it must be proven that the plan included a "critical element of criminality" in the sense that "its implementation embodied a sufficient

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¹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, Trial Chamber I, Case No. ICC-01/04-01/06, 14 March 2012, para. 1358.

risk that, if events follow the ordinary course, a crime will be committed.”² The Majority further states that what is decisive for committing a crime jointly with another is “whether the co-perpetrator performs an *essential role* in accordance with the common plan.”³ However, it is not necessary that the accused was present at the scene of the crime or that he physically perpetrated any of the crime’s elements.⁴ In other words, as long as the accused controls or masterminds the crime, it is unnecessary to establish a “*direct or physical link* between the accused’s contribution and the commission of the crime.”⁵

With respect to the subjective requirements of co-perpetration, the TC quoted but eventually deviated from the standard introduced in the PTC’s Confirmation of Charges decision.⁶ It concluded that the prosecution must prove that the accused meant to commit the crime or that he was aware that by implementing the common plan the crime’s consequences would occur in the ordinary course of events. Accordingly, it is not necessary that the plan be specifically directed at committing the crime. The prosecution must also show that the accused was aware of his essential contribution as well as that he was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.⁷

Well over 400 pages into the Judgment, the TC got to the facts. It stated it was persuaded that Thomas Lubanga, as President of the *Union des Patriotes Congolais* (UPC), was the ultimate authority in the political-military structure of the UPC and the *Force Patriotique pour la Libération du Congo* (FPLC).⁸ Based on all the evidence, it was also convinced that Lubanga and his alleged co-perpetrators had a common plan to build an effective army to take control over the province Ituri.⁹ In order to establish whether Lubanga made an essential contribution in accordance with the common plan, the Chamber then focused on reporting mechanisms and the question whether Lubanga was in a position to effectively issue instructions to the appropriate levels within the UPC/FPLC hierarchy.¹⁰ It found that there were structured and efficient reporting mechanisms and lines of communication in place that enabled Lubanga to stay fully informed of all key developments within the UPC/FPLC. Also, the TC found that Lubanga was in a position to give targeted directions down the UPC/FPLC hierarchical chain,¹¹ and the Chamber was satisfied that Lubanga did so

² *Ibidem*, para. 984.

³ *Ibidem*, para. 1000 (emphasis added).

⁴ *Ibidem*, para. 1003.

⁵ *Ibidem*, para. 1004.

⁶ *Ibidem*, paras. 1008, 1011.

⁷ *Ibidem*, para. 1018.

⁸ *Ibidem*, paras. 1162, 1169.

⁹ *Ibidem*, paras. 1132–1136.

¹⁰ *Ibidem*, para. 1177.

¹¹ *Ibidem*, paras. 1190, 1270.

by playing an active role in making decisions and giving instructions.¹² By virtue of his position as political leader as well as the army's Commander-in-Chief, Lubanga was therefore able to shape the organisation's policies and direct his alleged co-perpetrator's actions.

The TC also found that Lubanga's personal involvement is shown by his planning of military operations as well as the key role he played in providing logistical support, by making sure that weapons, ammunition, food, uniforms, military rations and other supplies were available for the troops.¹³ In its overall conclusion, the TC reiterated that Lubanga and his alleged co-perpetrators agreed to the common plan "to build an army for the purpose of establishing and maintaining political and military control over Ituri."¹⁴ According to the Chamber, this resulted, in the ordinary course of events, in the war crime of conscripting and enlisting children under the age of 15 to participate actively in the hostilities. Lubanga was aware that children were being used as soldiers and bodyguards, having used child soldiers as bodyguards himself, and he acted with the intent and knowledge required by Article 30 of the Rome Statute. In sum, Lubanga's role and position as the ultimate authority within the UPC/FPLC hierarchy, in combination with the activities he carried out personally, "lead to the conclusion that the implementation of the common plan would not have been possible without his contribution."¹⁵

The verdict is unanimous with respect to Lubanga's guilt and his role as co-perpetrator. But the Judges disagreed on the applicable doctrine for this mode of liability. While Judges Blattmann and Odio Benito adopted the Control Theory of Perpetration, Judge Fulford expressed concerns about this doctrine, rejecting it in his separate opinion. According to Judge Fulford, the text of the Rome Statute does not support the theory and it imposes an unnecessary and unfair burden on the prosecution.¹⁶ The Control Theory, developed by German scholar Claus Roxin in the 1960s, requires the high standard that the accused made an *essential* contribution to the common plan that resulted in the commission of the crime. Judge Fulford argued that requiring an essential contribution by the accused will often be unrealistic and artificial.¹⁷ Such an assessment results in a hypothetical investigation into what might have happened had the accused not been involved.

Moreover, Judge Fulford disagreed with the reasons provided by the PTC and endorsed by the TC for relying on the Control Theory. The first reason is the necessity of establishing a clear dividing line between the different modes of liability, and in particular, between principals and accessories.¹⁸ According to Judge Fulford, making

¹² *Ibidem*, paras. 1212, 1270.

¹³ *Ibidem*, para. 1270.

¹⁴ *Ibidem*, para. 1351.

¹⁵ *Ibidem*, para. 1270.

¹⁶ *Ibidem*, para. 3 (Judge Adrian Fulford, separate opinion).

¹⁷ *Ibidem*, para. 17 (Judge Adrian Fulford, separate opinion).

¹⁸ *Ibidem*, paras. 919–922, 999.

a rigorous distinction between the modes of liability in order to establish a hierarchy of seriousness is unnecessary because strict sentencing determinations do not apply at the ICC.¹⁹ Nor does a plain reading of the text of the Rome Statute support such a division.²⁰

The Majority's second reason for relying on the Control Theory is to establish liability for individuals who, "in spite of being removed from the scene of the crime, control or mastermind its commission."²¹ Judge Fulford maintained that this, too, is unnecessary since a plain reading of Article 25(3)(a) already secures this result.²² However, ultimately and despite all his reservations, Judge Fulford maintained that the Control Theory was the correct test to apply in this specific case, because it reflects the approach taken by the PTC in the Confirmation of Charges decision. In the absence of any explicit warning, it would have been unfair to the parties to change the applied test at this late stage.²³

The Chamber will hold a separate sentencing and reparations hearing, and an appeal is to be expected. Although it is premature to speculate on what the legacies of the Lubanga trial will be, no one can deny its historical significance for international criminal justice as it involves the first prosecution and verdict by a permanent international institution created to deal with mass atrocity cases.

The ICC has been less successful elsewhere, having made little progress with respect to Libya compared to the Court's expeditious start in the situation. To recapitulate, Tunisian fruit vendor Mohamed Bouazizi set himself on fire in December 2010, triggering the extraordinary chain of events now known as the Arab Spring. Many of the violent responses to uprisings in various regions of the Arab world remain beyond the ICC's reach, but the UN Security Council referred the situation in Libya to the Court in February 2011.²⁴ An eight-month civil war and a NATO intervention followed, and the regime finally collapsed with the capture and questionable death of its leader Muammar Gaddafi in November 2011.

The ICC Prosecutor swiftly moved forward and opened an investigation in Libya in March 2011. On 27 June 2011, PTC I issued three warrants of arrest, respectively for Muammar Gaddafi, his son Saif al-Islam Gaddafi and Libya's former intelligence chief Abdullah al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya from 15 February 2011 onwards.

However, none of the cases has made it to the ICC (yet). As to the first suspect, the PTC formally terminated the case against the regime's former leader Muammar Gaddafi on 22 November 2011 following his death. On 19 November 2011, Libyan

¹⁹ *Ibidem*, para. 9 (Judge Adrian Fulford, separate opinion).

²⁰ *Ibidem*, para. 7 (Judge Adrian Fulford, separate opinion).

²¹ *Ibidem*, para. 920.

²² *Ibidem*, para. 12 (Judge Adrian Fulford, separate opinion).

²³ *Ibidem*, para. 2 (Judge Adrian Fulford, separate opinion).

²⁴ SC Res. 1970, UN Doc. S/RES/1970 (26 February 2011), para. 4.

authorities captured the second suspect Saif al-Islam Gaddafi.²⁵ As of yet, Libya has failed to surrender Saif al-Islam Gaddafi to the Court, stating their objective to keep him in Libya through a variety of channels. Libyan authorities communicated these intentions through the media as well as to the ICC Prosecutor who seemed willing to allow a domestic prosecution.²⁶ Subsequently, on 23 January 2012, Libyan authorities officially sought to postpone the ICC Registrar's Surrender Request of 5 July 2011 pending the completion of national proceedings with respect to other crimes against Saif al-Islam.²⁷ The PTC denied this request on 7 March 2012, after which Libya notified the Chamber of their intentions to challenge the case's admissibility pursuant to Article 19 of the Rome Statute.²⁸ This notification, dated 22 March 2012, was accompanied by a second postponement request, which the Libyan authorities tried to base on Article 95 of the Rome Statute.²⁹ However, as the PTC affirmed in their decision on this request on 4 April 2012, Article 95 can only be invoked where there is already an admissibility challenge under consideration by the Court.³⁰ The request was therefore denied and Libya was once again reminded to immediately proceed with the surrender of Saif al-Islam to the Court. Of course, Libya may still challenge the case's admissibility pursuant to Article 19. If it does so, the question that the PTC now refused to answer becomes more urgent: does Article 95 apply to surrender requests?

And lastly, Abdullah Al-Senussi was arrested at Nouakchott airport in Mauritania on 17 March 2012, proving the numerous previous reports of al-Senussi's capture in Libya false. In addition to the ICC and Libya, France has also requested his extradition in relation to the 1989 bombing of an airplane in which 54 French nationals died, and for which a life sentence has already been handed down *in absentia*. According to Libyan Deputy Prime Minister Mustafa Abu Shagour, Mauritania already agreed to the extradition of al-Senussi to Libya, but there are no additional reports to corroborate

²⁵ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 6 December 2011, para. 3.

²⁶ Simons, M., 'Hague Prosecutor Opens Door to Libya Trial of Qaddafi Son and Aide', *New York Times*, 22 November 2011, available at: www.nytimes.com/2011/11/23/world/africa/hague-official-backs-trials-in-libya-for-two-men.html?scp=8&sq=Seif%20al-Islam%20el-Qaddafi&st=cse (last visited 8 April 2012).

²⁷ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 4 April 2012, para. 3.

²⁸ *Ibidem*, para. 5.

²⁹ Article 95 Rome Statute reads: "Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19."

³⁰ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, *supra* note 27, para. 18.

this statement.³¹ At the time of writing, it is therefore unclear whether al-Senussi is still in Mauritania and whereto he will be transferred.

In the meantime, the Court has made steady progress in a number of other situations. First, with respect to the situation in Kenya, PTC II confirmed the charges against four suspects of the post-election violence, namely William Ruto, Joshua Sang, Francis Muthaura and Uhuru Kenyatta on 23 January 2012.³² Trial dates have not yet been set. The Judges declined to confirm the charges against Henry Kosgey and Mohammed Hussein Ali. With respect to Kosgey, the PTC found there are not substantial grounds to believe he is criminally responsible, primarily, because the Prosecution relied on only one anonymous witness to prove the allegations. Given the lower probative value of anonymous witness statements, and in the absence of corroborating evidence, the evidence provided by the Prosecution was deemed insufficient to commit a person to trial.³³ With respect to Ali, the PTC found that there are not substantial grounds to believe that the Kenya Police, through which the crimes allegedly were committed, participated in attacks as alleged by the Prosecution.³⁴

Judge Hans-Peter Kaul dissented from both Confirmation of Charges decisions. Judge Kaul, who also dissented from the Majority's authorisation of the investigation on the same grounds,³⁵ stated he continued to believe that the ICC does not have jurisdiction *ratione materiae* in the situation in the Republic of Kenya.³⁶ He is not satisfied that the crimes allegedly committed by these four suspects occurred pursuant to or in furtherance of a policy of an organisation within the meaning of Article 7(2)(a) of the Rome Statute. Therefore, Judge Kaul finds that the crimes charged do not constitute crimes against humanity as set out in Article 7. His interpretation of 'organisational policy' differs from the Majority's in the sense that Judge Kaul reads Article 7(2)(a) to demand a higher threshold, separating states and quasi-states

³¹ Prieur, L. and Al Shachi, H., 'Mauritania agrees to Senussi extradition, Libya says', *Reuters*, 20 March 2012, available at www.reuters.com/article/2012/03/20/us-libya-senussi-idUSBRE82J0X120120320 (last visited 8 April 2012).

³² *Prosecutor v. William Samoei Ruto, Henry Kiproni Kesgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, Case No. ICC-01/09-01/11, 23 January 2012, para. 367; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, Case No. ICC-01/09-01/11, 23 January 2012, para. 429.

³³ *Prosecutor v. William Samoei Ruto, Henry Kiproni Kesgey and Joshua Arap Sang*, *supra* note 32, para. 293.

³⁴ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, *supra* note 32, paras. 424–427, 430.

³⁵ *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, Case No. ICC-01/09, 31 March 2011, pp. 84 *et seq* (Judge Hans-Peter Kaul, dissenting opinion).

³⁶ *Prosecutor v. William Samoei Ruto, Henry Kiproni Kesgey and Joshua Arap Sang*, *supra* note 32, para. 2 (Judge Hans-Peter Kaul, dissenting opinion); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, *supra* note 32, para. 2 (Judge Hans-Peter Kaul, dissenting opinion).

from private organisations. In his words, “the juxtaposition of the notions ‘State’ and ‘organisation’ in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established, those ‘organisations’ should partake of some characteristics of a State.”³⁷ Judge Kaul was not convinced that the level of a State-like ‘organisation’ within the meaning of the Statute was reached in these cases.

Second, Laurent Koudou Gbagbo was transferred to The Hague on 30 November 2011 following the issuance of an arrest warrant for crimes against humanity committed in Côte d’Ivoire. Gbagbo is the country’s former President, and he is allegedly responsible, as indirect co-perpetrator, for four counts of crimes against humanity, including murder, rape and other sexual violence, persecution and other inhuman acts, all allegedly committed in the context of Côte d’Ivoire’s post-election violence between late 2010 and 12 April 2011. Gbagbo’s initial appearance took place on 5 December 2011. PTC III set the date for the commencement of the confirmation of charges hearing for 18 June 2012. Also, on 22 February 2012, PTC III authorized the ICC Prosecutor to expand the temporal scope of the investigation in Côte d’Ivoire to include crimes committed within the jurisdiction of the Court between 19 September 2002 and 28 November 2010.³⁸

And third, a new arrest warrant was issued in the context of the situation in Darfur, Sudan. On 1 March 2012, PTC I issued a warrant of arrest against Abdel Raheem Muhammad Hussein for 41 counts of crimes against humanity and war crimes.³⁹ Hussein is currently Minister of National Defence of the Sudanese Government. Previously, he was Minister of the Interior and the Sudanese President’s Special Representative in Darfur. The execution of the arrest warrant is still pending.

In addition to the Court’s legal developments, the year 2012 also marks some significant changes in administration. During the Tenth Assembly of State Parties to the Rome Statute in New York from 12 to 21 December 2011, the Assembly elected Fatou Bensouda to be the new Chief Prosecutor of the ICC. The first and current Chief Prosecutor Luis Moreno-Ocampo will complete his term with the Court this summer at which time Bensouda will take office for a nine-year term starting 16 June 2012. Bensouda, from the Gambia, is currently the Court’s Deputy Prosecutor.

During the same marathon of meetings, six new judges were elected through a total of 16 rounds filled with lobbying, debating and voting. The newly elected judges comprise one third of the Court’s total of 18 judges, and are the following: Miriam

³⁷ *Prosecutor v. William Samoei Ruto, Henry Kiproni Kesgey and Joshua Arap Sang*, *supra* note 32, para. 7 (Judge Hans-Peter Kaul, dissenting opinion); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, *supra* note 32, para. 7 (Judge Hans-Peter Kaul, dissenting opinion).

³⁸ *Situation in the Republic of Côte d’Ivoire*, Decision on the “Prosecution’s provision of further information regarding potentially relevant crimes committed between 2002 and 2010”, Pre-Trial Chamber III, Case No. ICC-02/11, 22 February 2012, paras. 36, 37.

³⁹ *Prosecutor v. Abdel Raheem Muhammad Hussein*, Warrant of Arrest for Abdel Raheem Muhammad Hussein, Pre-Trial Chamber I, Case No. ICC-02/05-01/12, 1 March 2012.

Defensor-Santiago (the Philippines), Anthony Thomas Aquinas Carmona (Trinidad and Tobago), Robert Fremr (Czech Republic), Olga Venecia Herrera Carbuccia (Dominican Republic), Howard Morrison (United Kingdom) and Chile Ebou-Osuji (Nigeria). Moreover, on 11 March 2012, the ICC's Judges re-elected Judge Sang-Hyun Song (Republic of Korea) as President of the Court for a three-year term. Judge Sanji Mmasenono Monageng (Botswana) was elected First Vice-President and Judge Cuno Tarfusser (Italy) Second Vice-President.

There are 15 cases in seven situations currently before the ICC, and the Court is conducting preliminary investigations in seven countries, namely Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria. On 1 July 2012, the Rome Statute will enter into force for its newest member, the Republic of Guatemala, which brings the total of State Parties to the Statute to 121.⁴⁰

When reviewing the ICC's developments and progress, it is also important to note where the Court has not been active. Two situations come to mind. First, the Court's hands are tied with respect to Syria, because the country is not a State Party to the Rome Statute and the UN Security Council has not referred the situation to the Court. The world's attention has been focused on Syria for over a year now ever since the wave of the Arab Spring reached the country in March 2011. President Bashar al-Assad has been responding to the nationwide protests with brutal force while ignoring peace plans, which even caused the country to be expelled from the Arab League in November 2011.⁴¹ On 16 February 2012, the UN General Assembly voted overwhelmingly to approve a Resolution that condemned President Assad's crackdown on the uprisings in his country.⁴² However, permanent members China and Russia continue to frustrate stronger measures by the Security Council.

Second, the ICC Office of the Prosecutor announced in April 2012 that the Court lacks jurisdiction to investigate the 2008–2009 Gaza conflict in Palestine. The Office determined that Palestine is not a state within the meaning of Article 12(3) of the Rome Statute, and it can therefore not proceed with a full investigation into the situation.⁴³

⁴⁰ International Criminal Court Press Release, ICC-CPI-20120403-PR783 (3 April 2012), *available at*: www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr783 (last visited 12 April 2012).

⁴¹ Council of the League of Arab States Res. 7438 (12 November 2011), para. 1, *available at*: www.arableagueonline.org/wps/wcm/connect/65bd7b80495235058b6fef7abaae88c3/LAS+RES+7438+ENGLISH.pdf?MOD=AJPERES [unofficial English translation] (last visited 12 April 2012).

⁴² UN GA Res. 66/253, UN Doc. A/RES/66/253 (21 February 2012), para. 2.

⁴³ ICC Office of the Prosecutor, 'Situation in Palestine', 3 April 2012, *available at*: www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf (last visited 12 April 2012).